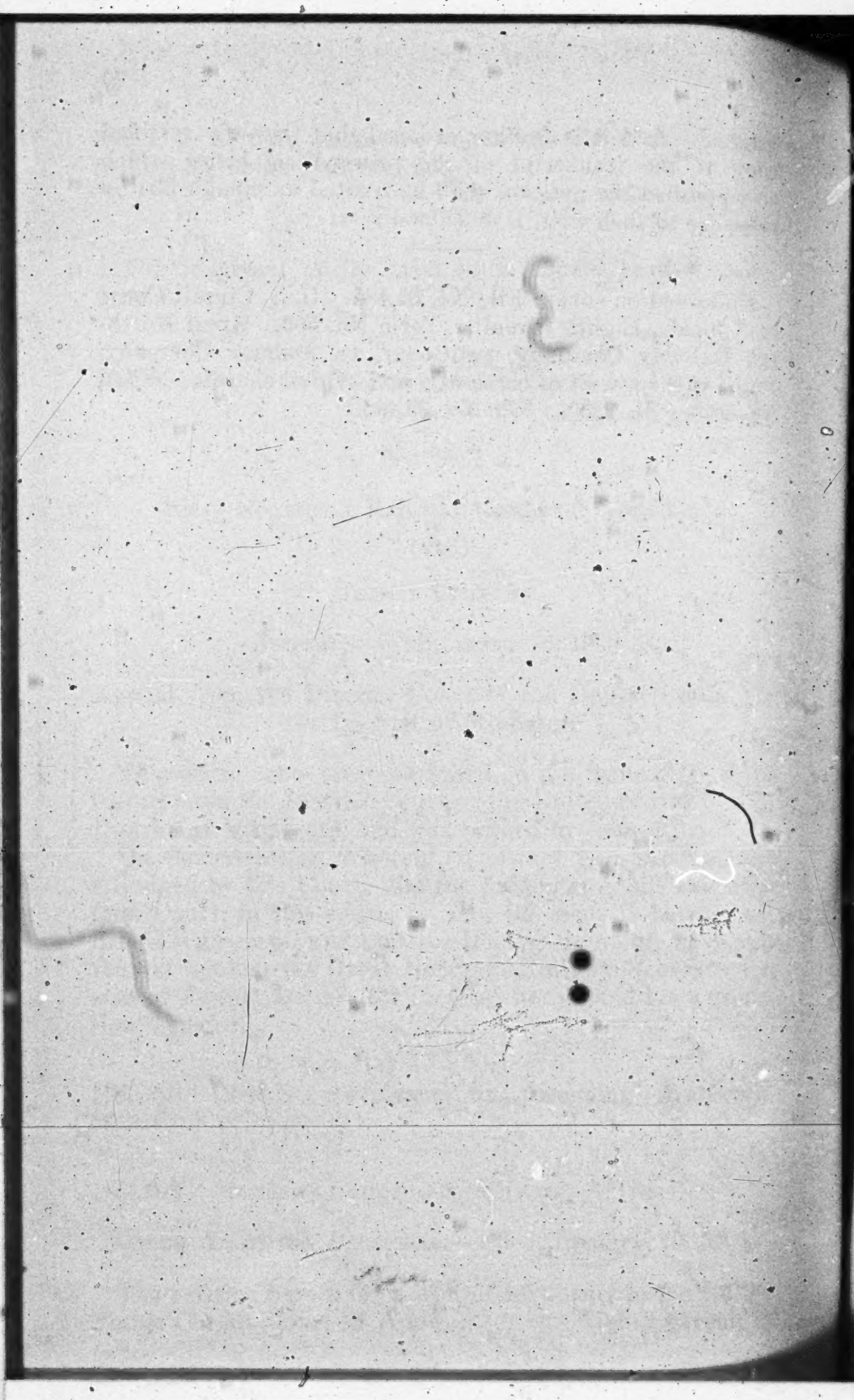

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CHARLES ELMORE C
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 563

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

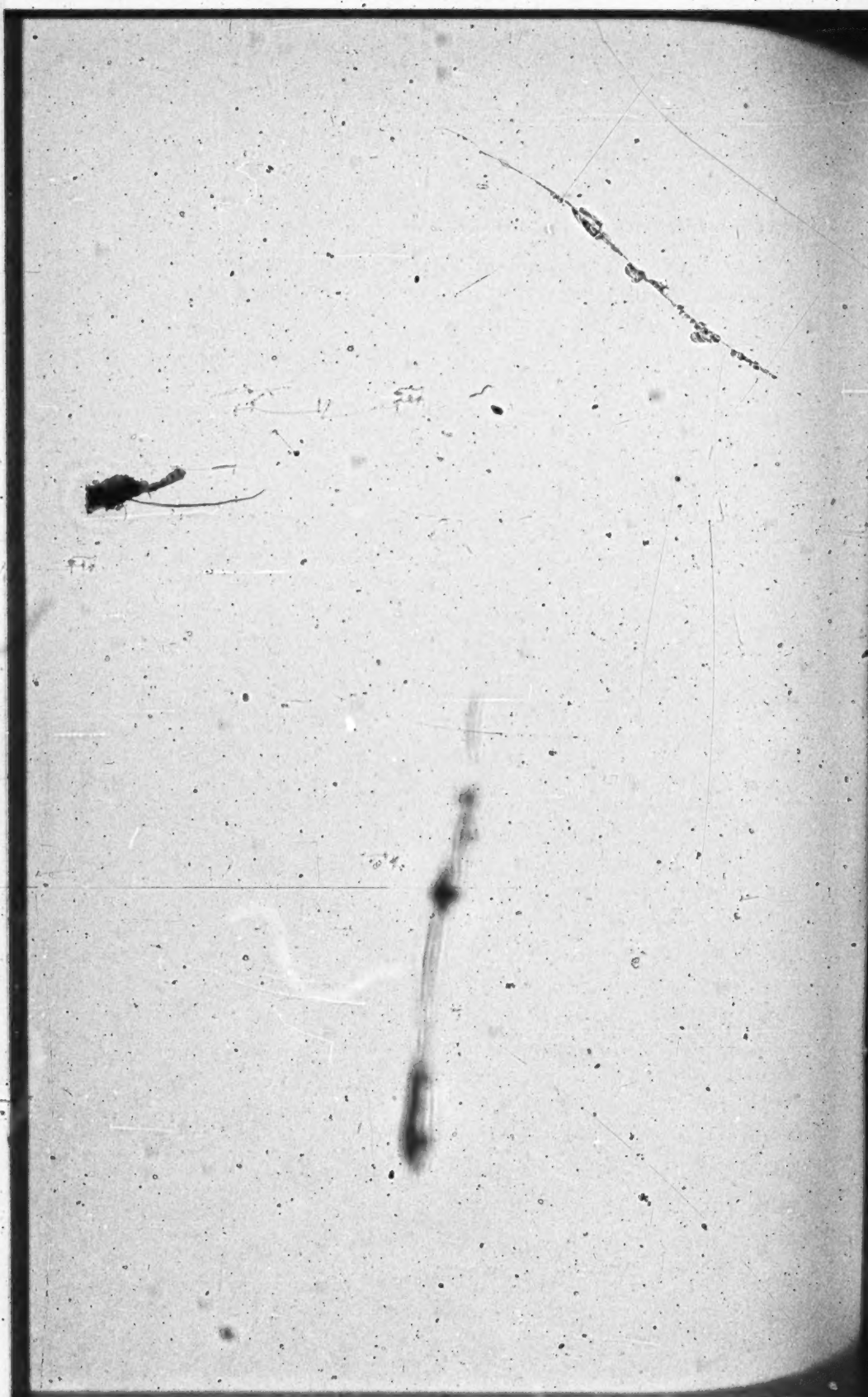
vs.

DELMAR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

F. G. DORETY,
R. J. HAGMAN,
Counsel for Petitioner.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

DELMAR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Great Northern Railway Company respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding involves the interpretation of a tariff filed with the Interstate Commerce Commission. A question of law only is involved, there being no dispute as to the facts. The precise question is: Where a tariff names a rate for trans-

portation between two points on the same railroad and is silent as to the route over which the rate applies, is the rate applicable only over the direct route between point of origin and destination or is it also applicable over circuitous routes?

The Delmar Company, a corporation engaged in buying and selling grain at Minneapolis, Minn., brought action in the District Court of the United States for the District of Minnesota against petitioner, Great Northern Railway Company, to recover $648.84, the amount of alleged excessive and unlawful charges collected by petitioner for the transportation of 26 carloads of grain. The shipments originated at numerous country stations on petitioner's railroad in Minnesota, North Dakota and South Dakota (see map, Rec. p. 72), were consigned by the various shippers to Minneapolis, were purchased by the Delmar Company and after arrival at Minneapolis were reconsigned by that company in the same cars to Superior, Wis., where delivery was made. The entire transportation was over the lines of petitioner. On each of these shipments petitioner collected its published local tariff rate applicable from the country station to Minneapolis, plus its published proportional tariff rate from Minneapolis to Superior. This combination of rates to and from Minneapolis was higher than the tariff rate for transportation from the country station to Superior, and the Delmar Company seeks to recover the difference (Rec. p. 22 *et seq.*).

The direct routes via petitioner's railroad from the country stations involved to Superior are not through Minneapolis. The routes via Minneapolis are circuitous, being from 43.7 miles to 75.7 miles, or from 12% to 23%, longer than the direct routes. Petitioner's tariff naming the charges from the country stations to Superior at the time these shipments moved was silent as to the routes over which the rates would apply. Peti-

tioner contends that under these circumstances the Court should find, as a matter of law, that the rates from the country stations to Superior applied only when the shipments moved over the direct routes to Superior and did not apply to shipments moving over the circuitous routes through Minneapolis which were taken by the shipments in question.

Prior to the institution of this proceeding in the District Court the Delmar Company brought a proceeding before the Interstate Commerce Commission to obtain reparation on these shipments. The Commission in its report (*Delmar Company v. Great Northern Railway Company*, 120 I. C. C. 530) held, with Commissioner Taylor dissenting, that the route from the country station through Minneapolis to Superior was "an open route" and in the absence of restricted routing in the tariff it must be found that the through rates to Superior applied via Minneapolis. At the trial in the District Court the Delmar Company offered no evidence other than the Commission's report and order.

The trial court stated in its opinion that common sense would seem to indicate that these rates applied only via the natural and direct routes and did not extend to shippers the privilege of using a longer and more circuitous route, but that it did not feel warranted in disturbing the Commission's construction (Rec. pp. 12-14). Upon appeal the judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals held (1) that the Interstate Commerce Commission had adopted and repeatedly announced a rule of construction that where there was more than one route from a point of origin to destination a rate between those points applied to a shipment over any one of those routes unless that route was unreasonably circuitous or unless the carrier had expressly limited the rate in the tariff

to a particular route designated therein; (2) that this was a departmental ruling or construction which the court should accept unless plainly wrong, and that in this case the Commission's ruling impressed the court as being essentially sound; and (3) that the Commission had determined that the routes through Minneapolis in connection with the shipments in question were not unreasonably circuitous, and that this finding was supported by substantial evidence and should not be disturbed by the court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) Possible constructions of such a tariff as is before the Court in this proceeding are:

(a) That the rate applies over any route the shipper may specify, no matter how circuitous, *e. g.*, over a route 500 miles in length when there is a direct route of 10 miles.

(b) The construction of the Commission adopted by the lower court that the rate applies over any routes which are not unreasonably circuitous, making it an administrative question for the Commission in each instance to determine whether a given route is unreasonably circuitous or not. This construction is erroneous as a matter of law. Among other things it results in leaving a shipper and the carrier in a state of uncertainty as to what the Commission might find after a long delay as to the reasonableness of any given route, and makes it impossible for a shipper before he makes his shipment to determine from the tariff what route is open to him on the rate named.

(c) The construction contended for by petitioner that the rate applies only via the direct route. This construction is a

natural and common sense one and enables a shipper before he makes his shipment to determine definitely the route to which the rate applies by examining a map and the carrier's mileage tables in the tariff.

The construction which should be placed upon tariffs like the one in question has never been determined by the Supreme Court. It is important to all railroads and shippers in the United States and does not involve merely the small sum sued for in this proceeding. Other similar cases are pending before the courts and the Interstate Commerce Commission, both on its formal and informal dockets, the disposition of which would be governed by the case at bar. The question arises constantly and has long been a troublesome one. We believe that it is an important question of federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

Since the Circuit Court of Appeals rendered its decision in this proceeding the Interstate Commerce Commission on October 14, 1930, issued its report in I. C. C. Docket No. 20,458, *Washburn Crosby Co. v. Great Northern Railway Co., et al.*, ... I. C. C. ...., involving identically the same question in connection with shipments of wheat from Minnesota, North Dakota, South Dakota and Montana to Superior, Wis., moving via the lines of petitioner and also the Northern Pacific Railway Company. The Commission followed its holding in the *Delmar case* but Commissioners Farrell and Lee dissent. Commissioner Brainerd concurs specially, saying that it seems reasonable to conclude that the rates from the country stations to Superior do not apply via the circuitous routes through Minneapolis but that the Commission so held in the *Delmar case*, which was upheld by the Federal courts, and that therefore he concurs in the conclusions of the majority. We have

the curious situation of the trial court in this proceeding (Delmar case) agreeing with the position of the petitioner but deferring to the Commission's views, and of a member of the Interstate Commerce Commission in a subsequent case agreeing with the views of petitioner but feeling himself under constraint because of the decision of the trial court in this proceeding.

(2) The Circuit Court of Appeals considered the Interstate Commerce Commission's rule of construction of tariffs as a "departmental ruling or construction" which the court should accept unless "plainly wrong." The court erred in this. The Commission's rule was not one promulgated by the Commission in its administrative capacity for future observance by carriers in preparing tariffs. It was merely the Commission's view of the *law* governing the interpretation of tariffs and was announced by the Commission in various cases pending before it to obtain reparation where the Commission acted in its semi-judicial capacity of determining the rights of private parties in connection with past shipments. The Supreme Court has held in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, that the question of what interpretation shall be placed on a railroad tariff is ordinarily one of law for the court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8821, *Great Northern Railway Company, Appellant, vs. Delmar Company, Appellee*, and that

said decree of the Circuit Court of Appeals of the United States for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GREAT NORTHERN RAILWAY COMPANY,
By F. G. DORETY,
R. J. HAGMAN,
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

DELMAR COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the District Court of the United States for the District of Minnesota, Fourth Division, is reported in *Delmar Co. v. Great Northern Ry. Co.*, 34 Fed. (2nd) 221, and is found at page 10 of the Record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, dated September 16, 1930, has not been officially reported to this date but is found at page 84 of the Record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on September 16, 1930 (Rec. p. 87), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (a) of Section 240 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 247).

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved."

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that the tariff in question should be construed as making the rates applicable to the circuitous routes through Minneapolis (Petitioner's motion for findings and judgment in its favor upon the sole and only ground that the evidence would support no other conclusion was denied by the trial court and exception allowed, Rec. p. 45).

2. The Circuit Court of Appeals erred in finding and holding that the Commission's rule of construction is a departmental ruling or construction which the court should accept unless plainly wrong.

3. The Circuit Court of Appeals erred in entering judgment against petitioner, except in connection with the shipments from Litchfield and Rogers, Minn., where the direct routes were through Minneapolis.

V.

ARGUMENT.

A.

STATUTE GOVERNING ACTIONS TO RECOVER REPARATION.

Where reparation ordered by the Interstate Commerce Commission is not paid the Interstate Commerce Act provides that the shipper may commence a proceeding in the Federal Court to recover his damages, which proceeding shall proceed in all respects like other civil suits for damages, except that on the trial the findings of the Commission shall be *prima facie* evidence of the facts therein stated (U. S. Code, Title 49, Sec. 16). It is only as to the *facts* contained in the Commission's report and order that they are made *prima facie* evidence in a proceeding before the court. *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 728. The case is before the court *de novo*. *Montrose Oil Refining Co. v. St. Louis-San Francisco R. Co.*, 25 Fed. (2nd) 750, 754.

B.

PRINCIPLES OF LAW GOVERNING INTERPRETATION OF TARIFFS.

In *Great Northern Ry. Co. v. Merchants Elevator Co.*, *supra*, this court discussed the principles of law governing the interpretation of railroad tariffs, saying at pages 290 to 292:

"It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.

* * * * *

But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact." (Italics ours).

C.

THE TARIFF SHOULD, AS A MATTER OF LAW, BE CONSTRUED AS MAKING THE RATES FROM THE COUNTRY STATIONS TO SUPERIOR APPLICABLE ONLY VIA THE DIRECT ROUTES.

We desire first to discuss the proper interpretation of the tariff without regard to the construction placed thereon by the Commission.

The Natural and Common-Sense Construction.

A typical page of the tariff which the Court is called upon to construe is page 43, which is reproduced as page 77 of the Record (Rec. p. 81). For example, that page shows a rate on wheat from Howes, N. D., to Superior, Wis., of 17½¢ per cwt. It will be noted that the tariff is silent as to the route over which that rate applies. The Delmar Company's shipment moved from Howes to Superior via the circuitous route through Minneapolis, a distance of 406 miles. The direct route from Howes to Superior is via Vance, Fargo, Sauk Center, St. Cloud and Milaca, a distance of 331.3 miles. The distance via the circuitous route through Minneapolis is 75.7 miles or 23% greater than the distance via the direct route (Rec. pp. 25, 26, 55, 71).

When a transportation company offers to transport a shipment between A and B for 17½¢ per cwt. and nothing is said as to the route over which the shipment will be carried, the common-sense and natural construction is that the offer is to transport the shipment over the direct route. There is no warrant for presuming that it is a matter of indifference to the carrier whether or not it incurs the additional expense of hauling the shipment an unnecessary distance of 75.7 miles. Not

only is the route through Minneapolis much longer but it requires the shipment to be handled through the large terminals of Minneapolis instead of through country junctions. The Interstate Commerce Commission found "Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are not encountered over the short route." (Rec. p. 57).

There is no basis in reason for reading into the tariff an obligation on the part of petitioner which is not expressed in the tariff and which would require petitioner to give a much more expensive service than it would give over the direct and natural route between Howes and Superior. The more natural and reasonable view would be that if the intention had been to give the shipper the right to require petitioner to haul the shipment "all around Robin Hood's barn", the tariff would have expressly given that right and would not have left it to implication. In *Reynolds v. Stockman*, 75 S. E. 341, 342, the court said:

> "Now, while it is true that an obligation may sometimes be implied from the contract as a whole or from the circumstances, and where the implication is necessary or is plain, it becomes as much a part of the contract as if it had been expressed; on the other hand, where it is not necessary to a fair and reasonable construction of the contract, or when it is not reasonably plain and clear that it was the intention of the parties, it ought not to be made a part of the contract by construction, for thereby the court might write into the contract an obligation which the parties did not intend. The doctrine of implied obligation should be applied with caution; otherwise, the courts would impose obligations not intended by the parties. 6 R. C. L. 856, Sec. 244."

Custom.

It is undisputed that petitioner's practice was not to move grain from points west of St. Cloud and Willmar to Superior via Minneapolis (Rec. p. 44). The Interstate Commerce Commission in its report said "Previously it was the custom to apply the through rate only via the direct route, and to apply the proportional rate on shipments reconsigned at Minneapolis" (Rec. p. 57). Thus we find that the custom, as determined by the Commission, supports the construction that in the absence of a provision of the tariff as to routing the rates apply only via the direct route. In *Robinson v. U. S.*, 80 U. S. 363, 366, it was said:

> "If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary."

Petitioner's Construction Avoids an Unlawful Result.

If the tariff in question is construed as making the rates from the country stations to Superior applicable via the circuitous routes through Minneapolis it will result in this same tariff naming higher rates for shorter than for longer distances over the same rails in the same direction, in violation of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 4). For example, the result would be that the tariff in question would name a

higher rate from Howes, N. D., to Cambridge, Minn., (a point intermediate between Howes and Superior via the circuitous route through Minneapolis) than from Howes to the more distant point of Superior, the two cars moving over the same rails in the same direction as far as Cambridge. The same situation exists as to other stations.

We were unable to make this point clear to the Circuit Court of Appeals, as appears from their discussion of it. However, it is a fact, as appears from the undisputed evidence (Rec. p. 30-33), and it was found to be a fact by the Interstate Commerce Commission for it made a finding on page 532 of its report that "Under complainant's interpretation there would be a violation of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act" (Rec. p. 57).

If there is any doubt as to the meaning of a contract it is a well-established principle of law that a construction which would make the acts of the parties lawful should be adopted rather than a construction which would make their acts unlawful:

> "For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."
>
> *Hobbs v. McLean*, 117 U. S. 567, 576.

> "Contracts are usually made with reference to the established law of the land, and should be so understood and construed, unless otherwise clearly indicated by the terms of the agreement."
>
> *Wilson v. Rousseau*, 45 U. S. 720, 764.

We believe the same principle should apply to a case of tariff construction. Under petitioner's construction its tariff would

not violate the long-and-short-haul clause of the Interstate Commerce Act.

The Interstate Commerce Act Precludes the Construction Placed on the Tariff by the Circuit Court of Appeals.

Paragraph (1) of Section 6 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 6) requires common carriers to file with the Commission and publish tariffs showing their charges "for *transportation* between different points" on their lines, which tariffs

> "shall *also* state *separately* * * * *all privileges or facilities* granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee." (Italics ours.)

Paragraph (7) of the same section forbids any carrier to "extend to any shipper or person any *privileges or facilities* in the transportation of passengers or property, *except such as are specified in such tariffs*" (Italics ours).

The "privileges or facilities" referred to obviously are services or benefits to the shipper *over and above* the ordinary, usual and necessary services rendered in "transportation between different points." If this were not so the statute would not add to the requirement that the tariff shall show the charges for "transportation between different points" the specific requirement that the tariff shall also state separately all privileges or facilities granted or allowed.

The following have been held to be privileges or facilities which a carrier may not lawfully extend to a shipper in connection with transportation unless such privileges or facilities are expressly provided for in the tariffs:

(a) Reconsigning a shipment to a more distant point after it has arrived at the billed destination, and charging the rate applicable to a shipment originally billed from the origin point to the final destination (*Kerns & Sons v. C. M. & St. P. Ry.*, 40 I. C. C 552, 554).

(b) Transit—stopping a shipment en route to final destination for the purpose of storing, milling, fabricating, compressing or otherwise treating it, and charging the rate applicable to a shipment moving directly from the origin point to final destination (*Armour & Co. v. D. L. & W. R. R.*, 101 I. C. C. 337, 339; *Fohner & Co. v. G. N. Ry. Co.*, 15 I. C. C. 33, 36).

(c) Stopping a shipment while en route to permit partial loading or unloading. (*Mississippi Pearl Button Co. v. A. T. & S. F. Ry. Co.*, 98 I. C. C. 560, 563).

(d) Furnishing artificial heat to prevent freezing while a perishable shipment is en route. (*McGovern v. Ann Arbor R. Co.*, 162 N. W. 668; *Clemons Produce Co. v. D. & R. G. R. R.*, 219 S. W. 660).

(e) Placing a perishable shipment in a roundhouse en route to prevent freezing, or expediting the shipment by attaching it to a passenger train (*Dolan Fruit Co. v. Davis*, 196 N. W. 168).

If the shipper had merely wanted "transportation" between Howes, N. D., and Superior, Wis., for example, he would have been satisfied to have had the shipment move from Howes to Superior over the direct route. He would have had no interest beyond having the shipment delivered safely and expeditiously at Superior. But when he wanted the shipment to pass through the primary grain market of Minneapolis, which was on a circuitous and less expeditious route, it must be assumed that he had an object in mind, for example, to try the market at Minneapolis. In this case the Delmar Company purchased the shipment and reconsigned it to Superior. Departing from

the usual and customary route between two points by hauling a shipment a roundabout way in order to pass through another primary market en route for the benefit of and at the request of the shipper is certainly a service *over and above* the ordinary, usual and necessary service incident to merely *transporting* a commodity between two points, and is as much a "privilege or facility granted or allowed" as are the various services enumerated above such as reconsignment, transit, etc.

The tariff nowhere states that the rates to Superior would apply over circuitous routes. If, in connection with the 17½¢ rate which the tariff named for transportation from Howes to Superior, petitioner had extended to a shipper the service of movement through Minneapolis over a circuitous and more expensive route it plainly would have violated section 6 of the Interstate Commerce Act by extending to a shipper a privilege or facility not specified in its tariff. In view of this fact it is clear that the tariff provision in question cannot be construed to permit the shipper to require the application of the rates to Superior to the route via Minneapolis.

The Commission's Interpretation.

Under the Commission's interpretation, which was approved by the Court, that where the tariff is silent as to the route over which the rates apply they apply over any routes which are not unreasonably circuitous, it is necessary in each case to have the administrative question of the reasonableness of any circuitous route determined by the Commission. That means that a shipper can never determine from the tariff itself whether the rate applies to any indirect route. He cannot determine this from the Commission before he makes his shipment. This interpretation of the tariff imports into it an uncertainty and

makes it impracticable. The interpretation contended for by petitioner that such tariffs should be construed as making the rate apply only over the direct route results in definiteness and certainty as the direct route can be ascertained by a map and an examination of the distance tables in the tariffs.

The interpretation of the Commission and court results in violations of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act, violates the provision of the act regarding the extension to a shipper of special facilities or privileges not specified in the tariff, imports into the tariff an obligation not provided for in the tariff, disregards the previous custom in interpreting the tariff, and places an unnatural construction on the tariff.

While the greatest degree of circuity via Minneapolis of any shipments involved in this proceeding is 23%, the Commission in other cases has found not unreasonable circuitous routes through Minneapolis which are much more indirect. For example, in one of the six cases decided with the *Delmar case* (120 I. C. C. 530) the Commission found that since the tariff was silent as to the route over which the rates applied, the rate from Mentor, Minn., to Superior, Wis., applied via Minneapolis, although the additional distance via Minneapolis was 234 miles or 98% greater than over the direct route (Rec. pp. 35-36; Exhibit 7, Rec. p. 80). This illustrates to what extremes the Commission is carrying its construction of such tariffs.

Petitioner's arguments to support its construction of the tariff are not met by saying that railroads could insert in tariffs the various junctions via which the rates from each origin point to each destination point would apply, as petitioner did in connection with this particular tariff some time after these shipments moved in order to forestall further demands of this character. The question before the court is one

of law and the tariff in question should be construed as any other written document.

D.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THE COMMISSION'S CONSTRUCTION SHOULD BE FOLLOWED UNLESS PLAINLY WRONG.

An examination of the cases in which the Commission announced its construction of such tariffs, including the cases cited by the Circuit Court of Appeals, discloses that they are all cases in which a shipper sought reparation from a carrier in connection with past shipments on the ground that the carrier collected a rate in excess of the rate named by the tariff, in violation of Section 6 of the Interstate Commerce Act. Such proceedings under the Interstate Commerce Act may be brought either in the courts or before the Commission. When they are brought before the Commission the Commission acts in a "quasi-judicial capacity to measure injuries sustained by a private shipper." *Baer Bros. v. D. & R. G. R. R.*, 233 U. S. 479, 486. As the Commission was dealing with past shipments and with the rights of private parties it was called upon, as a court would be, to determine what the law is in order to determine whether or not the shipper has been damaged.

In the case of *Great Northern Railway Co. v. Merchants Elevator Co., supra*, the Supreme Court said that "every question of the construction of a tariff is deemed a question of law" for the court, and that preliminary resort to the Commission is necessary only when some administrative question is presented such as the peculiar meaning of words employed in a tariff in a technical sense, or when extrinsic evidence is necessary to establish a usage or custom. In this case the Commission

found that previously petitioner's custom was to apply the rates only via the direct route (Rec. p. 57) and no words were used which called for a construction from the Commission. The Commission in its quasi-judicial capacity merely stated what it considered to be the *law* in interpreting such tariffs. The following cases are illustrative of instances where the Supreme Court found that the Commission erred in construing the law and itself determined what the law was:

U. S. v. N. Y. C. R. R., 263 U. S. 603.
Top Line Cases, 234 U. S. 1.
Central R. R. of N. J. v. U. S., 257 U. S. 247.
Philadelphia & Reading Ry. v. U. S., 240 U. S. 334.
Ann Arbor R. R. Co. v. U. S., 281 U. S. 658.

The Circuit Court of Appeals considered the Commission's construction of the law as a "departmental ruling or construction" which the court should accept unless "plainly wrong." As the Commission's construction was merely its view of the law the court should itself have determined the law and should not have considered the Commission's construction as one it should follow unless "plainly wrong." The result is that the court was under constraint when it should not have been, and petitioner has not had the entire benefit of the court's free and independent determination of the law.

Section 6, paragraphs (3) and (6) of the Interstate Commerce Act empower the Commission to make "suitable rules and regulations for the simplification of schedules of rates, fares, charges and classifications" and to "determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged." The Commission in the exercise of its administrative functions probably could have made a ruling binding on

the carriers to the effect that on and after a certain date tariffs for transportation over a single line of railway shall specifically state via what junctions the rates apply and if no junctions are specified the rates shall be considered to apply via any route which the Commission does not consider unreasonably circuitous. But the Commission did not do this. It did not purport to prescribe any rule in this respect that the carriers were required to comply with in preparing their tariffs.

If the Commission had intended an administrative ruling which the carriers should comply with it would undoubtedly have included it in its Tariff Circular 18-A which contains the Commission's rules to be observed by carriers in preparing and filing their tariffs and indicates what matter shall be included in tariffs and how it shall be arranged. If the Commission's rule had been included in its Tariff Circular 18-A the carriers would have had notice of it and would have been required to conform thereto in preparing the tariff in question. Certainly the Commission did not intend to promulgate a rule to be observed by all carriers under its jurisdiction simply by stating in an opinion in a controversy between private parties what it considered the law to be with respect to the interpretation of tariffs already issued.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors committed by the Circuit Court of Appeals may be corrected, and that to such end a writ of certiorari should be granted by this court and this court should

review the decision of the Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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